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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 485

ACE HAWTHORNE, SR.,

Petitioner,

VS.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR REHEARING

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes Ace Hawthorne, Sr., the petitioner herein, and presents his petition for rehearing in the above entitled cause, upon the grounds, and for the reasons hereinafter set forth.

The Illinois Uniform Narcotic Drug Act is unconstitutional.

1. **Summary of statutory provisions.**

In this part, we summarize the present Illinois laws relating to the unlawful possession and sale of marijuana, the unlawful sale of other drugs, and the penalties authorized upon conviction of these and other crimes.

In 1957, the Illinois legislature adopted the Uniform Narcotic Drug Act, which defined "narcotic drugs" to include marijuana, opium, morphine, heroin, and other substances. (Ill. Rev. Stat. 1957, Ch. 38, Secs. 192-28-1 et seq.,). With certain amendments, this Act remains in effect today. (Ill. Rev. Stat. 1969, Ch. 38, Secs. 22-1 et seq.)

The third subparagraph of Section 22-40 provides that a person convicted of selling any narcotic drugs shall not be released on probation or given a suspended sentence, and that the minimum sentence imposed may not be less than 10 years imprisonment. This provision is operative regardless of the defendant's background and record, the amount of marijuana sold, or the facts of the case leading to the conviction. The mandatory minimum penalties are required even though the defendant is convicted of sale of a gram of marijuana; no distinction is drawn between a first offender who sells or gives away a single marijuana cigarette to a friend (or supposed friend), and a person who wholesales 10 pounds of heroin to professional distributors ("pushers"). The statute requires imposition of the harsh penalties without regard to any mitigating circumstances which may be present, and despite the belief of the trial judge that the defendant should be released on probation or sentenced to a minimum term of less than 10 years.

A person sentenced to a minimum term of 10 years cannot become eligible for parole until he has served 6 years. 8 months.

The penalties in the Uniform Narcotic Drug Act for unlawful sale of heroin, opium, cocaine, morphine and certain other opium derivatives, are the same as those prescribed for marijuana. (Ill. Rev. Stat. 1967, Ch. 38, Sec. 22-2-17.) Together with marijuana, these drugs are defined as "narcotic drugs."

The Illinois Drug Abuse Control Act was enacted in 1967. (Ill. Rev. Stat. 1969, Ch. 111½, Secs. 801 et seq.) In it, a "depressant or stimulant drug" is defined to include various barbiturates, amphetamines, the drugs known as "LSD" and "speed" (methamphetamine), and any other substance designated by the Attorney General of the United States or the State Superintendent of Narcotic Control "as habit-forming because of its stimulant effect on the central nervous system . . ." or "*as having a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect.*" (Ill. Rev. Stat., Ch. 111½, Sec. 801 (f) (2) and (4).)

Although scientific and medical opinion is virtually unanimous that marijuana fits the description of "depressant or stimulant drugs," particularly that italicized above, marijuana is not encompassed within the Drug Abuse Control Act because Section 801 (e) of that Act *excludes* any substance defined as a "narcotic drug" in the Uniform Narcotic Drug Act.

The first conviction of unlawful sale of "depressant or stimulant drugs" is deemed a misdemeanor punishable by imprisonment in a penal institution other than the

penitentiary for not more than one year, and a fine of from $100 to $1,000; probation is permitted. Subsequent offenses are deemed felonies punishable by imprisonment of from one to five years and a fine of $500.00 to $2,500; here too, probation is permitted. (Ill. Rev. Stat. 1969, Ch. 111½, Sec. 804 (a).) The statute contains increased penalties for persons 18 years or older who sell a depressant or stimulant drug to a person under 18, or induces him to use such a drug: a first conviction is punishable by imprisonment for from 2 to 5 years, or a fine of not less than $5,000, or both, and subsequent convictions are punishable by imprisonment for from 5 to 6 years, or a fine of not less than $15,000, or both. Probation is permitted in all cases. (Ill. Rev. Stat. 1969, Ch. 38, Sec. 804 (a).)

Under the Illinois Criminal Code, all persons convicted of crime for the first time may be released on probation for up to five years, with only three exceptions, namely persons convicted of (1) an offense punishable by death, such as murder, (2) rape and (3) sale of narcotic drugs. (Ill. Rev. Stat. 1967, Ch. 38, Sec. 117.)

Thus, persons convicted of the following crimes (for example) may be released on probation without serving any time in the penitentiary: aggravated kidnapping, treason, aggravated battery, theft, arson, extortion, armed robbery, bribery, burglary, abortion, and deviate sexual assault, to mention just a few.

2. Scientists are now in virtually unanimous agreement that marijuana has fundamentally different effects than heroin, opium, morphine, and other so-called "hard drugs."

The scientific community has found that marijuana is a non-addictive intoxicant or hallucinogen, having far fewer adverse effects than the so-called "depressant or stimulant drugs" such as LSD, amphetamines and barbiturates.

An independent examination by this Court of the factual support, or lack thereof, for the classification of marijuana by the Illinois legislature is both appropriate and essential in this case. *Brown* v. *Board of Education*, 347 U.S. 483, 494-495 (1954). As the Court noted in *Leary* v. *United States*, 395 U.S. 6 (1969), at 38, fn. 68:

> "A statute based upon a legislative declaration of facts is subject to constitutional attack on the ground that the facts no longer exist; in ruling upon such a challenge a court must, of course, be free to re-examine the factual declaration. (Citing cases.)"

This principle of independent judicial inquiry is applicable to factual challenges to drug legislation. See *Leary* v. *United States*, 395 U.S. 6, 38-43 (1969); *Turner* v. *United States*, 396 U.S. 398, 410-416 (1970). Indeed, it is particularly applicable to such cases, for legislation based upon the police power, even if legitimate when made, is invalid where later events and experience show that it has become arbitrary. *Abie State Bank* v. *Bryan*, 282 U.S. 765, 772 (1931).

There is at present virtual unanimity among knowledgeable scientists that the effects of marijuana are entirely different from, and far less dangerous than, those of heroin, morphine, opium, and other so-called "hard-drugs," and indeed that the effects of marijuana are in many ways far less dangerous than the drugs defined in the Illinois statutes as "depressant or stimulant drugs," such as LSD, amphetamines, "speed" and barbiturates.

Relating to the effects and dangers of marijuana and other drugs, see:

"Resource Book for Drug Abuse Education," United States Department of Health, Education and Welfare (1969), 25, 26, 29-30.

"Fact Sheets," Bureau of Narcotics and Dangerous Drugs, United States Department of Justice (1969), 6-1-2, 7-2, 8-1, 9-2, 10-1-2.

Statement of Attorney General John M. Mitchell, before the Subcommittee to Investigate Juvenile Delinquency of the United States Senate Committee on the Judiciary (1969), 212.

Statement of Dr. Stanley F. Yolles, prepared for presentation before the Subcommittee to Investigate Juvenile Delinquency of the United States Senate Committee on the Judiciary (1969), 23-27.

Hearings before the Subcommittee on Public Health and Welfare of the House Committee on Interstate and Foreign Commerce (1970), 179 (statement of Dr. Stanley F. Yolles), 172-173 (statement of Dr. Roger O. Egeberg).

Hearings on Narcotics Legislation Before the Subcommittee To Investigate Juvenile Delinquency of the Senate Committee on the Judiciary (1969), 675 statement of (John E. Ingersoll).

Final Report of the President's Advisory Commission on Narcotic and Drug Abuse (1963), 42.

Report of the President's Commission On Law Enforcement and Administration of Justice ('The Challenge of Crime In a Free Society') (1967), 223-225.

Final Report of the National Commission On the Causes and Prevention of Violence (1969), 235-238.

United States Department of Health, Education and Welfare

In 1969, the United States Department of Health, Education and Welfare published a "Resource Book for Drug Abuse Education" which states (p. 26):

> ". . . Marihuana, which is not a narcotic, does not cause physical dependence as does heroin or other narcotics. This means that the body does not become dependent on continuing use of the drug. Neither does the body, probably, develop a tolerance to the drug, which would make larger and larger doses necessary to get the same effects. Withdrawal from marihuana does not produce physical sickness."

The Department of Health classifies marijuana as a "mild hallucinogen" (Id. p. 25).

In the "Resource Book," the Department of Health discusses the dangers faced by those who use so-called "dangerous drugs" (pp. 29-30):

> ". . . (Amphetamines) can drive a person to do things beyond his physical endurance that leave him exhausted. Heavy doses may cause a temporary toxic psychosis (mental derangement) which requires hospitalization. This is usually accompanied by auditory and visual hallucinations. Abruptly withdrawing the drug from the heavy abuser can result in a deep and suicidal depression.
>
> "Long-term heavy users of the amphetamines are usually irritable and unstable and, like other heavy drug users, they show varying degrees of social, intellectual and emotional breakdown.
>
> "Dangers from injecting 'speed' (methamphetamine) into the vein include serum hepatitis, abscesses, and even death in the case of unaccustomed high doses. Injection of 'speed' causes abnormal heart

rates and may result in serious psychotic states and long-term personality disorders.

". . . (Barbiturates) are physically addicting. Some experts consider barbiturate addiction more difficult to cure than a narcotic dependency. The body needs increasingly high doses to feel their effects. If the drug is withdrawn abruptly, the user suffers withdrawal sickness with cramps, nausea, delirium, and convulsions, and in some cases, sudden death. Therefore, withdrawal should take place in a hospital over a period of several weeks on gradually reduced dosages. It takes several months for the body to return to normal."

3. The continued classification of marijuana with the "narcotic drugs" rather than with the "dangerous drugs," with attendant mandatory Draconian penalties, violates the rights of defendant under the Due Process and Equal Protection Clauses of the United States Constitution and the Illinois Constitution.

As shown, expert opinion is overwhelmingly against the classification of marijuana with opiates. Thorough investigation has made it clear that marijuana is a stimulant and depressant drug, and a mild intoxicant or hallucinogen. The danger of marijuana to the user and to society is not at all comparable to that of opiates or even to that of most of the "depressant or stimulant drugs." Accordingly, it is totally irrational to require that a person, such as defendant, who is convicted for the first time of the possession of a small amount of marijuana, be imprisoned for 2 years.

At the outset, we wish to emphasize that defendant does *not* argue that the State cannot prohibit the sale, use or possession of marijuana under the general po-

lice power. Defendant does *not* contend that the legislative power is limited to regulation, rather than outright prohibition, of marijuana. Defendant does *not* contend that the legislature, having chosen to outlaw marijuana, must likewise prohibit substances such as alcohol, tobacco and caffeine (although there is considerable evidence that such substances are equally harmful as, or more harmful than, marijuana).

Moreover, under the facts of this case, the argument here can be limited *solely* to the validity of the penalties imposed upon (1) first offenders, not upon those who are convicted for second or subsequent offenses, (2) who sell or possess a small amount of marijuana, (3) to adults, not children.

The contention of the defendant is limited to the proposition that the present legislative classification of marijuana with the "narcotic drugs," *rather than* with the "depressant or stimulant drugs" is unsupported—indeed, is contradicted, by the present state of scientific and factual knowledge about the comparative natures and effects of the various drugs dealt with in the Illinois statutes. When the consequence to this defendant of this groundless and erroneous classification is a minimum sentence of 2 years in the penitentiary, rather than a maximum of 1 year with the possibility of probation, for the possession of a small amount of marijuana by a person never before convicted, defendant's constitutional rights under the Due Process and Equal Protection Clauses of the United States Constitution have been violated.

In *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, 560-561 (1902), the Court said, of statutory classifications, that:

"The difficulty is not met by saying that, generally speaking, the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations, in order to subserve public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. . . . But arbitrary selection can never be justified by calling it classificaton. The equal protection demanded by the Fourteenth Amendment forbids this . . . No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government . . . It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.' *Gulf, Colorado and Santa Fe Railway v. Ellis*, 165 U.S. 150, 155, 159, 160, 165. . . ." (Omissions in original.)

In *McLaughlin v. Florida*, 379 U.S. 184 (1964), the Court considered a statute which made cohabitation between unmarried persons a crime if they were of different races, but which did not proscribe cohabitation between persons of the same race. This distinction, the Court held, was not supported by the legislative purpose attributed to the law, the prevention of promiscuity (379 U.S. at 191):

"Judicial inquiry under the Equal Protection Clause . . . does not end with a showing of equal application

> among the members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose . . ."

The same principle is recognized by the Court below. In *Ronda Realty* v. *Lawton*, 414 Ill. 313 (1953), the Court held invalid a zoning ordinance requiring off-street parking facilities of apartment owners but not of hotels or rooming houses. The Court said that statutes based upon the general police power (414 Ill. at 317)—

> ". . . cannot, in such guise, under the rights guaranteed by the Illinois and Federal constitutions, effect an arbitrary discrimination against the class on which it operates by omitting from its coverage persons and objects similarly situated. Statutory classifications can only be sustained where there are real differences between the classes, and where the selection of the particular class, as distinguished from others, is reasonably related to the evils to be remedied by the statute or ordinance. (Citing cases.)"

See also *Grasse* v. *Dealers Transport Co.*, 412 Ill. 179, 193-194 (1952); *People ex rel. Adamowski* v. *Wilson*, 20 Ill. 2d 568, 581-582 (1960); *Harvey* v. *Clyde Park District*, 32 Ill. 2d 60, 64-66 (1964).

The materials set forth demonstrate beyond cavil that there is no rational basis for the Illinois statutory scheme by which marijuana is classified with "hard drugs" such as heroin and opium, rather than with the "depressant or stimulant drugs," or in a separate, lesser category.

There is another, and equally grave, defect in the statutory scheme, because persons convicted of selling marijuana for the first time are subject to a mandatory min-

imum 10-year sentence, without probation, while persons convicted for the first time of selling "depressant or stimulant drugs" receive misdemeanor penalties, with opportunity for release on probation.

In *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942), the Court considered the validity of an Oklahoma statute authorizing sterilization of any person convicted of two "felonies involving moral turpitude" who was thereafter convicted of such a felony in Oklahoma. Skinner was thrice convicted in Oklahoma of "felonies involving moral turpitude"—stealing chickens (once) and robbery with firearms (twice). Thereafter, a proceeding under the sterilization statute was instituted against Skinner, and an order for his sterilization was entered. The Court observed that under Oklahoma law, embezzlement was not considered to involve moral turpitude (316 U.S. at 538-539):

> ". . . A clerk who appropriated over $20 from his employer's till (id. Sec. 1456) and a stranger who steals the same amount are thus both guilty of felonies. If the latter repeats his act and is convicted three times, he may be sterilized. But the clerk is not subject to the pains and penalties of the Act no matter how large his embezzlements nor how frequent his convictions. A person who enters a chicken coop and steals chickens commits a felony (id. Sec. 1719); and he may be sterilized if he is thrice convicted. If, however, he is a bailee of the property and fraudulently appropriates it, he is an embezzler. Id. Sec. 1455. Hence, no matter how habitual his proclivities for embezzlement are and no matter how often his conviction, he may not be sterilized. . . ."

The Court held that the statute's illogical and capricious classifications rendered the law violative of the Constitution (316 U.S. at 541-542):

". . . The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.' (Citing case.) When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. (Citing cases.) Sterilization of those who have thrice committed grand larceny, with immunity for those who are embezzlers, is a clear, pointed, unmistakable discrimination. . . . In terms of fines and imprisonment, the crimes of larceny and embezzlement rate the same under the Oklahoma code. Only when it comes to sterilization are the pains and penalties of the law different. The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn. (Citing case.) . . ."

Mr. Chief Justice Harlan Fiske Stone, concurring, said (316 U.S. at 545):

". . . A law which condemns, without hearing, all the individuals of a class to so harsh a measure as the present because some or even many merit condemnation, is lacking in the first principles of due process. (Citing cases.) . . ."

Thus, the Illinois statutes contain two fundamental defects as they apply to persons convicted of a first sale of a small quantity of marijuana. The statutory classification is doubly irrational:

First, a person convicted of a first sale of marijuana is subject to the same mandatory severe penalties as those convicted of selling "hard drugs," such as heroin, which are totally unlike marijuana and have far greater dangerous effects upon society, and

Second, persons convicted of a first sale of other drugs ("depressant or stimulant drugs") which are more dangerous than, or equally as dangerous as, marijuana, are not subjected to the mandatory harsh sentences but are treated as misdemeanants, may be released on probation, and may be sentenced to a maximum of one year in jail.

For both these reasons, the cases cited above condemn the legislative classification which requires that an unconscionably severe penalty be imposed upon persons convicted for the first time for sale or possession of a small amount of marijuana. "The equal protection principle of *Skinner* and *McLaughlin*, may be stated as follows: The statute must cover all persons or things related to each other logically or scientifically where their inclusion in the classification is necessary to effectuate the legitimate purposes of the statute." *Note*, *Marijuana Laws: A Need For Reform*, 22 Ark. L. Rev. 340 (1968). Yet the Illinois statutory scheme, in the words of the *Skinner* case, "lays an unequal hand on those who have committed intrinsically the same quality of offense" and thereby has "made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."

The Supreme Court of Washington has recently commented on the very kind of classifications contained in the Illinois statutes involved in the case at bar, in *State* v. *Zornes*, 469 P. 2d 552 (Wash. 1970). Holding that an amendment to the state's drug laws reclassifying marijuana from "hard drugs" to drugs of lesser danger should be given retroactive effect, the Court recognized the grave constitutional problems which would arise if the prior classifications remained in effect. After reviewing many of the scientific treatises on the distinctions between the effects of

marijuana and "hard drugs" (469 P. 2d at 558-559). The Court said (469 P. 2d at 559-560):

> "The consensus is that cannabis is not a narcotic but rather is a mild hallucinogenic and that it has a stimulating and depressant effect on the central nervous system. Thus it is a drug of the type included within the dangerous drug act.
>
> "In its 1969 amendments to the narcotic drug act and the dangerous drug act, the legislature tacitly acknowledged that cannabis has always been in the dangerous drug act and not in the narcotic drug act. It evidently took cognizance of what is now generally known about cannabis—that its use does not lead to addiction, that is, its use can be discontinued without withdrawal symptoms, such as are suffered by opium addicts and alcoholics. The human body does not develop a tolerance to it, as it does to opium and alcohol. Some individuals may become emotionally dependent upon it, and it may indeed have beneficial effects, but its use does not, in itself, create problems of addiction."

The classification of marijuana in the Illinois statutes and the unduly heavy penalties upon a first conviction for unlawful sale or possession cannot withstand rational scrutiny. The first conviction for sale of a small amount of marijuana to an adult is punished with the same severity as a first conviction for sale of 10 pounds of heroin to a minor; the minimum penalty is 10 times greater than that permitted to be imposed upon persons convicted of selling other drugs having equal or greater adverse effects. To mention the provisions for release on probation, the statute requires penalties far more severe than those provided for upon conviction of almost every other crime, including crimes of violence to persons such as rape, armed robbery and kidnapping while armed, and crimes involving serious

damage to property such as arson and theft, as well as crimes which undermine basic institutions such as perjury and official misconduct. Indeed, the mandatory *minimum* upon a first conviction for sale of marijuana is greater than the *maximum* sentence authorized for many other crimes of much greater magnitude.

As the Illinois drug statutes are presently arranged, one convicted of the sale of marijuana, even if for a "amateur" rather than a "professional" transaction, *must* be imprisoned for 10 years just as if he had sold "hard" drugs, *despite* the fact that marijuana is a "stimulant/depressant/hallucinogen" rather than a "narcotic." Regardless of how legitimate this combining of marijuana with "hard" drugs may have seemed when the first Illinois drug statute was passed in 1931, the legislature had no rational basis for *maintaining* that combination after it created a second and lesser category of prohibited drugs when the Drug Abuse Control Act was passed in 1967. It is one thing to say, in 1951, that marijuana should be in the "prohibited" rather than the "allowed" category; it is quite another to say today that, despite all available evidence to the contrary, marijuana should continue to be classified as a "narcotic" rather than a "depressant or stimulant drug." This continued classification of marijuana as a "narcotic" is simply wrong in fact; when the consequence to defendant of this erroneous grouping is a penalty *at least* ten times harsher than any he could receive were marijuana properly classified with the "depressant or stimulant drugs," this arbitrary classification unconstitutionally deprives defendant of his rights to equal protection and to due process of law.

The present Illinois classification of marijuana is invalid under *Skinner* and *McLaughlin*; for it is a distinction with-

out a rational basis; indeed, it goes beyond those cases, for it is directly *contrary* to the universal convictions of scientists and authorities knowledgeable in the effects and dangers of drugs.

4. Requirement of a 2-year minimum sentence for possessing marijuana, constitutes a disproportionate, cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Article II, Section 11 of the Illinois Constitution.

The defendant was sentenced to the Illinois State Penitentiary for a term of not less than two years nor more than five years.

Because the penalty imposed upon defendant was totally disproportionate to the nature of his offense, the statute requiring the sentence, and the sentence itself, violated Article II, Section 11 of the Illinois Constitution, which provides in part:

> "All penalties shall be proportioned to the nature of the offense. . . ."

The sentence also violated defendant's rights under the Eighth Amendment to the United States Constitution, which provides in part:

> ". . . nor (shall) cruel and unusual punishments (be) inflicted."

The cruel and Unusual Punishment Clause is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459, 463 (1937); *Robinson* v. *California*, 370 U.S. 660, 666 (1962).

There is simply no way to justify the harsh penalty imposed on defendant for the relatively minor offense for which he was convicted.

This case is controlled by the principle announced in *Weems* v. *United States*, 217 U.S. 349 (1910), that there must be some rational relationship between the conduct of the defendant and the punishment imposed upon him. In *Weems*, the Court held unconstitutional a statute which, like Section 22-40 (3), required a minimum sentence of many years even in cases involving minor infractions of the law.

Weems was convicted of falsifying government records in the Philippine Islands in the amount of 616 pesos; the statute carried a minimum penalty of from 12 to 20 years "cadena temporal." "Cadena temporal" required that the prisoner be chained at the ankle and wrists, and carried with it the loss of certain civil rights even after completion of the sentence. (See 217 U.S. at 364-365.) Weems received a sentence of 15 years. The Court held that the law violated the Cruel and Unusual Punishment Clause because it required imposition of a penalty which was totally disproportionate to the gravity of the offense for which Weems was convicted. The Court held that the Clause was intended to prohibit disproportionately severe sentences as well as those "which inflicted bodily pain or mutilation." (217 U.S. at 372.) The Court used language that, but for its reference to a foreign government, fits perfectly the Draconian penalty imposed on defendant in the case at bar (217 U.S. at 377):

> "An extended review of the cases in the state courts interpreting their respective constitutions we will not make. It may be said of all of them that there was not such challenge to the import and consequence of the inhibition of cruel and unusual punishments as the law under consideration presents. It has no fellow in American legislation. Let us remember that it has come to us from a government

> of a different form and genius from ours. It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the bill of rights, both on account of their degree and kind. And they would have those bad attributes even if they were found in a Federal enactment and not taken from an alien source."

The Court observed that the Cruel and Unusual Punishment Clause ". . . in the opinion of the learned commentators may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice. (Citing cases.)" (217 U.S. at 378.)

The Court pointed out the penalties which Weems would suffer even after he concluded his term of imprisonment. (217 U.S. at 364-365.) Similar penalties will befall defendant as a convicted felon. Sections 124-1 and 124-2 (a) of the Illinois Criminal Code provide:

> Section 124-1. "'Infamous crimes' are the offenses of arson, bigamy, bribery, burglary, deviate sexual assault, forgery, incest or aggravated incest, indecent liberties with a child, kidnaping or aggravated kidnaping, murder, perjury, rape, robbery, *sale of narcotic drugs*, subornation of perjury, and theft if the punishment imposed is imprisonment in the penitentiary." (Emphasis added.)
>
> Section 124-2 (a) "A person convicted of an infamous crime shall forever thereafter be rendered incapable of holding any office of honor, trust or profit, or voting at any election, or serving as a juror, unless he or she is again restored to such rights by the terms of a pardon for the offense or otherwise according to the law."

The Court will observe that a person who is convicted of a first sale of "depressant or stimulant drugs" in violation of the Drug Abuse Control Act (Ch. 111½, Sections 801-812) *is not deemed guilty of either a felony or of an "infamous crime."*

The penalties which will be suffered by defendant by reason of his conviction will pursue him during his entire life. For example, he cannot vote (Ill. Const. Art. VII, Sec. 7; Ch. 46, Sec. 3-5; Ch. 38, Sec. 124-2); he is ineligible for election to the Illinois Legislature (Ill. Const. Art. IV, Sec. 4); he cannot be licensed as a private detective (Ch. 38, Secs. 201-6a (d), 201-10b (1)), or under the Dram Shop Act (Ch. 43, Sec. 120 (4)), or as a pharmacist (Ch. 91, Secs. 55.7-6). He is ineligible to serve in the Illinois National Guard. (Ch. 129, Sec. 251.) He may not serve as an executor of a will. (Ch. 3, Sec. 77.) The conviction is grounds for divorce. (Ch. 40, Sec. 1.) He may be refused permission to carry firearms for five years after his release from the penitentiary. (Ch. 38, Sec. 83-8 (c).) He may be refused a license as a veterinarian (Ch. 91, Secs. 124.12 (2), (7)), or as a doctor (Ch. 91, Sec. 16a (2)), or as an embalmer (Ch. 111½, Sec. 73.20 (b)), or as a funeral director (Ch. 111½, Sec. 73.10 (b)), or as a psychologist (Ch. 91½, Sec. 415 (1)), or as a surveyor (Ch. 133, Sec. 45 (a)). These are but a few examples of the indelible effects defendant will suffer because of the unduly harsh penalty imposed in Illinois upon those convicted of unlawful sale of marijuana.

As Justice Rabinowitz said, concurring in *Faulkner* v. *State*, 445 P. 2d 815 (Alaska 1968), where the court was faced with a similar problem (445 P. 2d at 823):

> ". . . What is lacking here is any indication that we are dealing with a professional or dangerously depraved criminal. In my view, if the present sen-

tence were to remain unaltered, any possibility of appellant's reformation would be brutally negated."

In *Weems*, the Court observed, as we have above that many more serious crimes were not punished so severely as the crime of which Weems was convicted. (217 U.S. at 380.) Speaking of those differences in treatment, the Court said (217 U.S. at 381):

". . . And this contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice. The State thereby suffers nothing and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal."

The Court dismissed the case against Weems.

See also *Chicago & A. R. R. Co.* v. *People*, 67 Ill. 11, 26-27 (1873), applying Article II, Sec. 11 of the Illinois Constitution; *Faulkner* v. *State*, 445 P. 2d 815, 819 (Alaska 1968).

As we stated, we do not contend that Illinois may not punish persons found guilty of a first unlawful sale of marijuana. We only say that when it does, the punishment must bear some rational relation to the nature and gravity of the offense, and to the other penalties provided for crimes of a similar nature.

The penalties provided by Section 22-40 (3) for sale of marijuana were considered by the Court in *People* v. *Gonzales*, 25 Ill. 2d 235 (1962), and were there upheld against the claim that they were unconstitutionally disproportionate to the nature of the offense. After noting the traditional

judicial reluctance to override the judgment of the legislature, the necessity that a penalty be "cruel," "degrading" or "so wholly disproportionate to the offense committed as to shock the moral sense of the community," and the line of authority upholding legislative judgments, this Court said (25 Ill. 2d at 240-241):

> "Even if we were to take into account the possibility of reduction of the period of imprisonment on the basis of 'good time' and the operation of the parole laws, a mandatory sentence of imprisonment for a minimum of 10 years would still be a severe penalty for a first offense involving the sale of marijuana. On the other hand, the seriousness of the traffic in narcotics is apparent from the number of narcotics cases in this court, without considering more comprehensive statistics. It may be that there are more effective techniques for the control and elimination of the narcotics traffic than a solution that takes the form of penalties of increasing severity. . . . Nevertheless, having in mind the deadly toll that is exacted by the narcotics traffic, we can not say that the penalty fixed in this case is 'disproportionate to the nature of the offense.'"

When this Court decided the Gonzales case, it did not have before it any scientific evidence demonstrating that marijuana is not a narcotic, is not addictive, and has properties and effects which are far less dangerous than most of the so-called "depressant or stimulant drugs" such as "speed." Indeed, most of the competent scientific evidence on this subject has been published since 1962. Although we do not here question the correctness of *Gonzales* at the time that case was decided, we submit that this extremely severe penalty is disproportionate of first conviction for possession of a small amount of marijuana *when viewed in light of the knowledge and evidence existing in 1970.*

Neither the harshness of the sentence, nor the questionable efficacy of drastic penalties as a remedy for a socio-medical problem, have lessened since *Gonzales* was decided in 1962. In light of the great advances in knowledge of the past eight years, however, the other side of the scale recognized in *Gonzales*—"the deadly toll that is exacted by the narcotics traffic"—has lost its persuasiveness *as applied to a single sale of a small amount of marijuana*. Although the evidence already discussed can support the conclusion that a heavy toll is indeed exacted by the use and wholesale distribution of certain drugs—including the hard narcotics, and the mildly-punished LSD, "speed" and other "depressant or stimulant drugs"—scientific knowledge refutes any argument that a single sale of a small quantity of marijuana—the offense at bar—"exacts a deadly toll."

Even when measured against the strongest arguments reputably advanced against marijuana, 2 years of imprisonment is not proportionate to the dangers posed by a person, never previously in trouble with the law, convicted of possessing a small amount of marijuana. Rather, it is harsh, excessive and disproportionate to the nature of the offense; it is cruel; it is completely unjustified.

For these reasons, we submit that the Court should hold that the mandatory minimum penalty of 10 years imprisonment, without probation, for sale, and 2 years imprisonment for possession, are unconstitutional.

5. The provisions of Section 22-40 (3) of the Illinois Criminal Code, which require imposition upon a defendant of a minimum sentence of 10 years without probation, impinge upon the prerogative and duty of the judiciary to exercise sound discretion in imposing sentences.

The doctrine of separation of powers, by which judicial functions are exclusively presented to the courts, is embodied in Article III of the Illinois Constitution:

> "The powers of the government of this State are divided into three distinct departments—the legislative, executive and judicial; and no person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted."

Traditionally, the power to determine what penalties are to be inflicted upon violators of criminal laws is vested in the legislature. *People* v. *Smith*, 14 Ill. 2d 95, 97 (1958). While extremely broad, this power is not unlimited. Thus, in *People* v. *Biron*, 400 Ill. 449, 453, (1948), the Court said:

> ". . . The nature, character and extent of penalties are matters for the legislature, which may prescribe definite terms of imprisonment or specific amounts as fines or fix the maximum or minimum limits of either, and the courts cannot interfere unless there has been a great departure from the fundamental law and the spirit and purpose thereof, or the penalty is manifestly in excess of constitutional limitations. (Citing case.)"

Defendant submits that a mandatory 10-year sentence, and the prohibition of probation, renders Section 22-40 (3) invalid as applied to first offenders, because it destroys the judicial function of determining the punishment which should be imposed in each case. These provisions are direct-

ly contrary to "the fundamental law and the spirit and purpose thereof," which dictate that the trial judge should exercise a broad and wise discretion in fixing the penalty to be imposed upon persons convicted of crime. The outrageously high penalties mandated by Section 22-40 (3) render the judicial power meaningless, and frustrate the exercise of judicial discretion in cases such as that at bar.

In *Agran* v. *Checker Taxi Co.*, 412 Ill. 145, 149 (1952), the Court said:

> ". . . The General Assembly has power to enact laws governing judicial practice only where they do not unduly infringe upon the inherent powers of the judiciary. (*People* v. *Calloway*, 358 Ill. 11.) Were this not true, a basic tenet of our democratic form of government would be destroyed, and the relevant constitutional provisions rendered nugatory. It is the undisputed duty of the court to protect its judicial powers from encroachment by legislative enactments, and thus preserve an independent judicial department."

The sentence to be imposed upon defendant was determined long before the commission of the crime charged, by men and women who never saw or heard of defendant. The trial judge went through the motions of imposing sentence, but because of the mandated penalties, the proceeding was unreal. The sentence was nothing more than a rubber stamp consistent with the legislative command. Imposition of the sentence was a clerk's job, not a judge whose power comes from the Constitution and whose highest duty is to exercise honest and intelligent judgment in the cases which come before him.

"Because there are so many factors in an individual case which cannot be predicted in advance, it is unsound for the

legislature to require that the court impose a minimum period of imprisonment which must be served before an offender becomes eligible for parole or for the legislature to prescribe such a minimum term itself." A.B.A. Project on Minimum Standards for Criminal Justice, "Standards Relating to Sentencing Alternatives and Procedures" 142 (1968).

Because it deprives the judiciary of any reasonable range of discretion in cases, Section 22-40(3) impinges unlawfully upon the powers of the judiciary, and therefore runs afoul of Article III of the Illinois Constitution.

Conclusion

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, the petitioner prays that this Court grant a rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted.

JOHN R. SKIVELY,
Counsel for Petitioner.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in Rule 58 (2).

JOHN R. SKIVELY,
Counsel for Petitioner.

APPENDIX

A

Constitutions

Constitution of the United States

Articles in Addition to and Amendment of the Constitution

Amendment VIII

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Amendment XIV

"Section 1. * * * nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the State of Illinois.

Adopted in Convention at Springfield, May 13, 1870. Ratified by the People, July 2 1870. In force, August 8, 1870.

Article II

Bill of Rights

Due Process

"Section 2. No person shall be deprived of life, liberty or property, without due process of law.

Penalties

"Section 11. All penalties shall be apportioned to the nature of the offense. * * *"

B.

Statute

Uniform Narcotic Drug Act

An Act defining and relating to narcotic and other dangerous drugs, to make uniform the law with reference thereto and to repeal certain acts therein named. Approved July 11, 1957. L. 1957, p. 2569. Effective January 1, 1958.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 22-1. Title of Act.) Section 1. This Act shall be known and may be cited as the "Uniform Narcotic Drug Act".

Section 22-2. Meanings of words.) Section 2. The following words and phrases shall have the meanings ascribed to them in Sections 2-1 to 2-19, inclusive. As amended by act approved Aug. 1, 1961. L. 1961, p. 2475.

Section 22-2-17. Narcotic drugs.) Section 2-17. "Narcotic Drugs" means any of the following:

(1) Alpha eucaine

(2) Beta eucaine

(3) "Cannabis" includes all parts of the plant Cannabis Sativa L. (commonly known as marihuana), whether growing or not; the seeds thereof, the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manu-

facture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom) fiber, oil or cake, or the sterilized seed of such plant which is incapable of germination.

(4) "Opium" includes morphine, codeine, and heroin, * * *.

(5) "Coca leaves" includes cocaine, and any compound, manufacture, salt, derivative, mixture, or preparation of coca leaves, * * *.

(6) "Isonipecaine" * * *.

(7) "Methadone" * * *.

(8) All parts of the plant of the genus Lophophora whether growing or otherwise; * * *.

(9) "Dromoran" * * *

(10) "Nisentil" * * *.

(11) "Ketobemidone" * * *.

(12) Any compound of Dihydrohydroxcodeinone or any salt thereof by whatever trade name identified.

(13) "Anileridine" * * *.

(14) "Piminodine" * * *.

(15) "Phenazocine" * * *.

(16) Any other narcotic drugs added by rule by the Division; * * *.

Section 22-3. Violation.) Section 3. It is unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense or compound any narcotic drug, except as authorized in this Act. No person shall unlawfully use, or be under the influence of or be ad-

dicted to the unlawful use of narcotic drugs. As amended by act approved July 22, 1959. L. 1959, p. 1893.

Section 22-40. Penalties.) Section 38. Whoever violates this Act by traffic in, selling, prescribing, administering, or dispensing any narcotic drugs, shall be imprisoned in the penitentiary for any term from 10 years to life, and for any subsequent offense shall be imprisoned in the penitentiary for life. Any offense under this Act is a subsequent offense if the violator has been previously convicted of an offense under this Act or any previous Act of this State relating to narcotic drugs or of a felony under any law of the United States or of the District of Columbia relating to narcotic drugs. No probation or suspension of sentence shall be granted to any violator convicted under this paragraph.

Whoever violates this Act by possessing, having under his control, manufacturing, or compounding any narcotic drug shall be fined for the first offense not more than $5,000 and be imprisoned in the penitentiary for a period of not less than 2 years or more than 10 years. For any subsequent offense the violator shall be imprisoned in the penitentiary for any term from 5 years to life. Any offense under this Act is a subsequent offense if the violator has been previously convicted of an offense under this Act or any previous Act of this State relating to narcotic drugs or of a felony under any law of the United States or of the District of Columbia relating to narcotic drugs. No probation or suspension of sentence shall be granted to any violator who has been convicted of any subsequent offense.